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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC

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OCT 21 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
**MARC SOBEL** ) WT DOCKET NO. 97-56  
)  
Applicant for Certain Part 90 Authorizations )  
in the Los Angeles Area and Requestor Of )  
Certain Finder's Preferences )  
)  
**MARC SOBEL AND MARC SOBEL** )  
**D/B/A AIR WAVE COMMUNICATIONS** )  
)  
Licensees of Certain Part 90 Stations in the )  
Los Angeles Area )

To: Honorable John M. Frysiak  
Administrative Law Judge

**WIRELESS TELECOMMUNICATIONS BUREAU'S REPLY TO  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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October 21, 1997

## Summary

Sobel failed in his proposed findings of fact and conclusions of law to address a key issue in this proceeding -- whether he misrepresented material facts to the Commission or lacked candor. The Bureau, on the other hand, demonstrated that Sobel intended to deceive the Commission, and on that independent basis alone, Sobel is basically unqualified to be or remain a Commission licensee.

With respect to the matters that Sobel did address in his proposed findings of fact and conclusions of law, Sobel demonstrated that he cannot be relied upon to deal truthfully and candidly. Thus, as discussed more fully below, Sobel's findings of fact and conclusions of law by and large mischaracterized the record in this proceeding, ignored important evidence, misconstrued case precedent, and made reference to matters that were not supported by the record evidence.

Sobel's proposed findings of fact and conclusions of law do not alter the Bureau's firm belief that Sobel lacks the fundamental indicia of reliability required to be a licensee. Accordingly, the Presiding Judge should issue an initial decision revoking Sobel's licenses, denying Sobel's pending applications, and dismissing Sobel's finder's preference requests.

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**WIRELESS TELECOMMUNICATIONS BUREAU'S REPLY TO  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, now replies to the "Proposed Findings of Fact and Conclusions of Law" filed by Marc D. Sobel (Sobel) on September 25, 1997. The Bureau's failure to respond to a particular finding of fact or conclusion of law is not a concession that the matter is accurate or meritorious.

**I. PRELIMINARY MATTERS**

2. Sobel's findings and conclusions only address the transfer of control issue

designated in this proceeding. The only reference to the misrepresentation or lack of candor issue in Sobel's document is a footnote claiming that the Bureau has not met its evidentiary burdens under the issue, and reserving the right to reply to any findings or conclusions offered by the Bureau. Sobel Findings, p. 2 n.1.<sup>1</sup> Sobel's failure to meaningfully discuss the misrepresentation/lack of candor issue is a disservice to the Presiding Judge. By failing to provide any meaningful analysis on that basic qualifying issue, Sobel has made it more difficult for the Presiding Judge to reach his decision and to prepare an initial decision. Sobel has also deprived the Presiding Judge of the opportunity to have the Bureau respond to Sobel's analysis of the misrepresentation/lack of candor issue.

## **II. SOBEL'S FINDINGS ARE NOT RELIABLE**

3. The Presiding Judge should not accept Sobel's findings at face value. In certain critical instances, Sobel's pleading mischaracterizes the record. Sobel's proposed findings also ignore important evidence of Kay's control over the Management Agreement stations. In other instances, Sobel's findings contain statements which are not supported by transcript citations or record evidence.

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<sup>1</sup> Sobel's proposed findings and documents will be cited as Sobel Findings (or Sobel Conclusions, as appropriate), p. X, ¶ Y, where X is the page number, and Y is the paragraph number being cited. The Bureau's proposed findings and conclusions will be cited in a similar manner.

#### A. Mischaracterizations

4. In Paragraph 27 of his findings (at p. 11), Sobel claims that he "determines and carries out all policy decisions, including the preparation and filing of applications with the Commission." Sobel goes on to argue in his proposed conclusions that Sobel "has maintained complete and total control" over the preparation and filing of applications. Sobel Conclusions, p. 16 ¶37. The record amply demonstrates that Kay, not Sobel, controlled the policy decisions involved in filing applications. Kay located the frequencies that Sobel could apply for. Tr. 73. With one exception, Kay made the arrangements to ensure availability of the sites. Tr. 84-85. The applications were prepared using Kay's computer, specialized software, and information template. Tr. 74-75, 206. Sobel admitted that Kay prepared "most" of the applications. Tr. 74. None of the applications in the record contains any evidence that Sobel prepared them. In every case where hand written information concerning emission designators was contained in an application, it was Kay's handwriting that appeared in the application. Tr. 76-78. While Sobel relies on his review of the applications as evidence of his control over the application process (Sobel Conclusions, p. 17 ¶38), the only changes he recalls having made involved correcting the spelling of his name. Tr. 75. Clearly, Kay, not Sobel, controlled the policy decisions relating to the filing of applications.

5. A second proposed finding that mischaracterizes the record is the claim that "Sobel determines the price to be charged for service on the 800 MHz repeaters . . ." Sobel Findings, p. 11 ¶27. No transcript citation is offered for this claim, perhaps because it is

totally contrary to the record. Paragraph I of the Management Agreement gives Kay the right to negotiate contracts with customers. WTB Ex. 39, p. 2, Tr. 128. Sobel's rights under the agreement are limited to rejecting a negotiated rate if he can show that the rejection is in the interest of both parties. WTB Ex. 39, p. 5. Out of the hundreds of customers on the Management Agreement stations, Sobel could recall only two or three instances in which he had modified a rate. Tr. 123. The standard rate for the Management Agreement stations is the same standard rate charged for Kay's licensed 800 MHz stations. Tr. 129. Moreover, Sobel could not even recall whose idea it was to change the standard rate the last time the rate had been changed. Tr. 130. Accordingly, Sobel's claim that he determines the prices charged for service on the Management Agreement stations is patently false.

6. Third, Sobel proposes the following finding in paragraph 21 of his proposed findings (at p. 9):

Sobel did not study the agreement carefully before signing it, relying instead on his belief that his attorneys had prepared an agreement that codified his relationship with Kay and complied with FCC requirements. (Tr. 109, 263-264)

One can search the cited pages in vain for any support for the proposition that Sobel did not read the agreement carefully before signing it. Instead, at Tr. 264, Sobel testified:

Q. How carefully did you review the agreement before you executed it?

A. Well, I read the agreement. It seemed to me pretty much what we had agreed to do. So, it was fine with me.

7. Fourth, Sobel makes the following finding of fact at paragraph 25 of his proposed findings (on p. 11):

On another occasion, Kay advised Sobel of an opportunity to sell all of his 800 MHz stations for \$1,500,000. Although this was at a time when Kay very much needed the money because of his legal problems, and notwithstanding the \$500 option provision in the written agreement, **Sobel vetoed the deal because he did not want to sell the stations at that time.** (Tr. 274-275) (Emphasis added).

First, the record contains nothing about Kay's need for money or the reason that Kay might have been interested in selling the stations. More fundamentally, the claim that Sobel "vetoed" the sale is flatly inconsistent with the record. After Sobel testified that Kay had been approached and offered \$1.5 million for the Management Agreement stations, Sobel testified as follows (Tr. 275):

Q. What was your response to that?

A. Well, I was a little surprised that someone should offer so much money, but nevertheless, I really wanted to keep the stations. They had the potential to make money if the FCC process would allow us, and I just didn't -- I wanted to keep them.

Q. Did Mr. Kay communicate to you his preferences in this matter?

A. Well, he was quite interested in selling them. I convinced him otherwise.

Q. So he acquiesced to your desires in that regard?

A. Yes.

Sobel did not "veto" the sale, as he claims in his proposed findings. Instead, he persuaded Kay, the person who had the contractual power to sell the stations, that a sale was not in their interests. Kay merely acquiesced to Sobel's suggestion. Sobel's attempt to claim that he "vetoed" the sale is fundamentally inaccurate.



8. Finally, Sobel proposes the following finding of fact at paragraph 25 of his proposed findings (on p. 11):

On one occasion for example, Kay negotiated for the sale of one of Sobel's stations, for which Sobel was paid \$20,500--far more than the \$500 option price (Tr. 126-127), and, more significantly, **an amount dictated by Sobel.** (Tr. 374) (Emphasis added)

Sobel's claim that he "dictated" the amount of money he would receive from the sale of the station is another mischaracterization of the record. The record shows that Kay, not Sobel, determined how much money Sobel would receive from the sale of the station. By the terms of the Management Agreement, Sobel was legally entitled to no more than \$500 for the sale of any individual station. It was at Kay's discretion that Sobel received any amount in excess of \$500. Tr. 202. Moreover, the testimony upon which Sobel relies shows that Sobel asked Kay for \$20,500 as opposed to requiring that Kay pay him that amount:

Q. So you discussed this arrangement with Mr. Sobel before the deal was done?

A. That's the first person I went to.

Q. And he was satisfied with this arrangement, that it was equitable?

A. He set the dollar figure. He said he wanted 20 grand. I said, fine with me.

Tr. 373-374. The meaning of this testimony is clear - Sobel asked Kay for a portion of the money that Kay received in connection with the sale of the Sobel-licensed station, and Kay acquiesced. There is nothing in the record to suggested that Sobel dictated to Kay the amount of money that he would receive from the sale.

## B. Lack of Transcript Citations and Record Evidence

9. Another problem with Sobel's document is that, in many instances, Sobel offers proposed findings of fact without offering record citations in support of the proposed finding. Section 1.264 of the Commission's Rules requires that each proposed finding of fact be supported by an appropriate citation to the transcript or exhibit which supports the proposed finding. Sobel's document is rife with proposed findings of fact which are not supported by record citations. See, e.g., Sobel Findings, p. 6 ¶14, p. 7 ¶16, p. 10 ¶23, pp. 11-12 ¶27. The absence of citations makes it very difficult for the Presiding Judge and the Bureau to check the accuracy of Sobel's claims. Moreover, in many instances, there is no record support for the findings Sobel proposes. For example, in Paragraph 14 of Sobel's findings (at p. 6), there is no apparent record support for the claim that "Marketing to potential 800 MHz users was a different niche than the UHF customers to whom Sobel catered to that time." In Paragraph 25 of Sobel's findings of fact (at p. 11), there is no apparent record support for the finding that "In the event a station was sold or otherwise disposed of, Sobel had no doubt that he and Kay would come to mutually agreeable terms notwithstanding the existence of the \$500 option."<sup>2</sup>

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<sup>2</sup> As noted above, the statement in Paragraph 27 of the proposed findings (at p. 11) that "Sobel determines the price to be charged for service on the 800 MHz repeaters", which is not supported by a transcript citation, is wrong.

### III. KAY CONTROLS THE MANAGEMENT AGREEMENT STATIONS

10. As shown in the Bureau's findings and Sobel's findings, Sobel was involved in certain aspects of the construction and operation of the Management Agreement stations. The critical question for the Presiding Judge to determine is whether that involvement shows that Sobel controlled the Management Agreement stations. The Bureau made a comprehensive showing in its proposed findings and conclusions that Kay held absolute control over the Management Agreement stations. Sobel's attempt to show that he controls the Management Agreement stations is not convincing.

11. The Bureau and Sobel agree that the standards for determining whether an unauthorized transfer of control have taken place are contained in Intermountain Microwave, 24 RR 983 (1963). Sobel Conclusions, p. 13 ¶30, Bureau Conclusions, pp. 40-41 ¶71. Furthermore, the Bureau agrees with Sobel's statement that in applying the Intermountain criteria, the totality of the circumstances must be considered. Sobel Conclusions, pp. 13-14 ¶31. The problem with Sobel's arguments is that he does not consider the totality of the circumstances. Instead, Sobel's arguments ignore the terms of the Management Agreement and other evidence which shows Kay's dominance over the affairs of these stations.

12. Sobel cites Motorola, Inc., File Nos. 507505, et. al., (Chief, Private Radio Bureau,

issued July 30, 1985)<sup>3</sup> for the proposition that SMR licensees can hire third-party managers to help run their systems, so long as the licensee has a proprietary interest in the equipment, and the licensee exercises the supervision the system requires. Sobel Conclusions, p. 14 ¶32. The Bureau has never argued, and does not intend to argue, that it is impermissible for an SMR licensee to hire a manager to assist in operating the station. However, it *is* impermissible for a "manager" to have total control over a station's operation while the nominal licensee works as a mere contractor selected and paid by the manager. In Motorola, the licensee owned the equipment and had an independent financial obligation with a financing company. The agreement also specifically provided that Motorola would have to perform its functions pursuant to the licensee's supervision and instruction. See Motorola, Inc., *supra*, ¶19. In contrast, the only stake that Sobel has in the equipment is the right to use the equipment with Kay's permission. WTB Ex. 39, p. 3 (Paragraph 4). Sobel has no financial obligations with respect to the Management Agreement stations. When Sobel works on the Management Agreement stations, he does so as Kay's contract technician. Moreover, several sections of the Management Agreement give Kay the sole right to negotiate contracts and to manage the stations. Accordingly, nothing in the Motorola decision allowed Sobel to cede control over the Management Agreement stations to Kay.

13. With respect to the first Intermountain factor, Sobel argues, "There is little

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<sup>3</sup> Sobel states that a copy of the order is attached to his proposed findings and conclusions. Sobel Conclusions, p. 14 n.6. The Bureau's copy of Sobel's pleading did not contain a copy of the Motorola order. For the convenience of the parties, a copy of the order is attached to these reply findings.

question that Sobel enjoys unfettered use of all facilities an[sic] equipment used for his 800 MHz repeaters." Sobel Conclusions, p. 14 ¶32. In making that argument, Sobel ignores the pertinent provisions of the Management Agreement and the fact that Sobel obtains access to the equipment in his capacity as a technician selected and paid by Kay. Paragraph III of the Management Agreement gives Kay the sole right to determine who maintains and repairs the stations. WTB Ex. 39, p. 3. When Sobel works on the Management Agreement stations, he does so as Kay's "hilltop repairman." Tr. 329. Kay could decide at any time that somebody else other than Sobel will work on the Management Agreement stations, and Sobel has no right to contest that decision. Thus, while Sobel currently has access to the equipment, that access is subject to Kay's ultimate control. The issue is not whether Sobel "leased" the equipment or owned the equipment. See Sobel Conclusions, p. 15 ¶33. The issue is who has ultimate control over the equipment. The record clearly shows that Kay has that control.<sup>4</sup>

14. With respect to daily operations, Sobel attempts to contrast himself with an absentee owner and describes himself as "actively and fully involved in all aspects of the day to day operations." Sobel Conclusions, p. 16 ¶34. While Sobel is involved in certain aspects of the operations of the Management Agreement stations, Kay controls both Sobel's

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<sup>4</sup> Sobel cites the language in the summary decision in Ellis Thompson Corp., 10 FCC Rcd 12554, 12556 (ALJ 1995) to the effect that the Intermountain criterion of unfettered use must be adapted to "current realities." Sobel Conclusions, p. 15 ¶33. If Sobel is suggesting that the unfettered use criterion is no longer valid, the Commission's reliance on the Intermountain criteria in the HDO shows that argument has no merit. If Sobel is merely using that language to bolster his argument that it is legitimate for a licensee to lease his equipment, the Bureau has no argument with that proposition, but the totality of the evidence shows Kay has ultimate control over the equipment.

involvement in the affairs of the Management Agreement stations and the daily operations of those stations. Sobel's argument simply ignores Kay's exclusive rights under the Management Agreement to sell service and to manage the stations (Bureau Findings, pp. 13-14 ¶24), as well as Kay's right to decide at any time that somebody other than Sobel would repair and maintain the stations. WTB Ex. 39, p. 3. While it is clear that Sobel had some involvement in the day-to-day operations of the stations, that involvement is virtually indistinguishable from his involvement in the day-to-day operations of Kay's stations. In arguing that Sobel has not transferred control, Sobel primarily relies upon his day-to-day role in tasks such as maintaining and repairing the equipment, activating and deactivating customers, and monitoring the stations. Thus, while Sobel finds it an important element of control that Sobel activates and deactivates customers on the Management Agreement stations, he does the majority of the activations and deactivations on stations licensed to Kay. Tr. 123-124, 347-348. Sobel repairs and maintains Kay's repeaters (Tr. 72, 106, 327), and he cannot determine from his invoices whether work he performed related to a Management Agreement station or a station licensed to Kay. Tr. 116, 243. Similarly, Sobel monitors stations licensed to Kay just as often as he monitors the Management Agreement stations. Tr. 117. Sobel does not claim that his work as a contractor on Kay's licensed stations gives him control over Kay's stations. His work as a contractor selected and paid by Kay does not give him control over the Management Agreement stations. While Sobel is involved in the operations of all the stations for which he works as a contract technician or provides services, that involvement falls far short of establishing his control over those stations.

15. Sobel's conclusion that he controls the policy decisions relating to the Management Agreement stations (Sobel Conclusions, pp.16-17 ¶¶35-38) also cannot be accepted because it is based upon mischaracterizations of the record. As the Bureau has shown above, it is simply incorrect for Sobel to claim that he has maintained "complete and total control" over the preparation and filing of FCC applications. Sobel Conclusions, p. 16 ¶37. Similarly, the Bureau has shown that Sobel's claim to have "personally determined" (Sobel Conclusions, p. 16 ¶36) when to change prices charged for service is wrong. In his discussion of the preparation of applications, Sobel attempts to liken Kay to a lawyer or an application processing firm. Sobel Conclusions, p. 17 ¶38. This attempt ignores the extent of Kay's involvement. Neither lawyers nor application processing firms ordinarily select transmitter sites for a licensee or personally enter into leases on their own behalf. Moreover, Sobel fails to take into consideration Kay's control over important policy decisions involving acquisition and disposition of Sobel-licensed stations. Bureau Findings, pp. 20-23 ¶¶39-44, Bureau Conclusions, p. 45 ¶80.

16. Sobel's discussion of control over personnel is disingenuous. Sobel claims not to have any employees, and argues that the employees of Kay who perform functions relating to the Management Agreement stations "are not station employees." Sobel Conclusions, p. 17 ¶39. That argument is pure sophistry. Kay's employees perform all sorts of functions relating to the Management Agreement stations. See Bureau Findings, pp. 13-17 ¶¶24-30. The Intermountain factor asks who is in charge of employing, supervising, and firing personnel. The people who recruit and service customers, fix repeaters, and perform the

billing and collection functions are among the personnel covered under that factor. There is no dispute that Kay hires, supervises, and fires his employees. Even with respect to Sobel, Kay has the right to dismiss him from his work on the Management Agreement stations at any time. WTB Ex. 39, p. 2. Sobel's statement that Kay has not hired any employees specifically to work on the Management Agreement stations is irrelevant. The important point is that the people who work on those stations are hired, supervised, and fired solely by Kay. Finally, Sobel's claim that he "is in daily contact" with Kay and Kay's employees has no record support. Indeed, Sobel's billing records (WTB Ex. 25) show that there are many days when he does no work for Kay. The record shows that Kay controls the personnel who perform work relating to the Management Agreement stations. Kay's dominion over personnel, according to Intermountain, is a critical factor in establishing that Kay controls the Management Agreement stations.

17. Sobel's discussion of the payment of operating expenses (Sobel Conclusions, pp.17-18 ¶¶40-41) is a bizarre attempt to distort simple facts. Sobel clearly testified:

Q. Except for an instance where you may have missed billing Mr. Kay for a part, is it correct that Mr. Kay has, in fact, paid all the expenses relating to the Management Agreement stations?

A. Yes.

Tr. 131. The argument that Sobel is somehow paying the operating expenses by agreeing to forego the \$600 a month of revenue from each station<sup>5</sup> is gibberish. The record reveals that

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<sup>5</sup> In fact, as the Bureau will discuss below, Sobel does not receive any of the operating revenue, even when a station grosses over \$600 a month in revenue.



to date Kay has paid all expenses for, and received all revenues from, the operations of the stations. Tr. 348-352. Moreover, Sobel's claim that "The operating expenses for the 800 MHz repeaters is [sic] not substantial" (Sobel Conclusions, p. 17 ¶40) is contradicted by Sobel's own testimony that he did not have the money to build *and operate* 800 MHz stations himself. Tr. 184-187. Sobel's failure to candidly acknowledge that Kay pays all the operating expenses demonstrates that his findings and conclusions are not reliable.

18. Similarly, Sobel's conclusions concerning the receipt of revenues and profits (Sobel Conclusions, pp. 18-19 ¶42) do not withstand scrutiny. Sobel argues that although he is entitled to receive one-half of all revenue beyond \$600 a repeater a month, the only reason he has not received any money whatsoever from the operations of the stations is the Commission's failure to process applications which would allegedly improve his stations. Id. Sobel's attempt to thrust blame on the Commission is a transparent attempt to deflect attention from the fact that all of the monies from the Management Agreement stations are placed directly into Kay's bank account. Tr. 348. Sobel's argument ignores the important point that while four of the fifteen stations have revenues in excess of \$600 a month, and the agreement provides that Sobel is entitled to half of that excess revenue, Sobel has not received any of that money. Tr. 132. Sobel cannot blame the Commission for his failure to receive money to which he is legally entitled under the agreement. Furthermore, Sobel offered no competent evidence or explanation to support his supposition that he would be receiving money from the operations of the stations if his pending applications were granted. In reality, Kay receives all revenues, pays all the bills, and keeps all profits. Sobel's only financial interest in the

Management Agreement stations is the pay he receives as Kay's contract technician. Kay has absolute financial control over these stations.

19. With respect to the written Management Agreement, Sobel claims that the agreement "expressly gives Sobel more than adequate supervision and oversight authority to maintain control of the licensed stations . . ." Sobel Conclusions, p. 19 ¶43. That argument is based upon Paragraph VIII of the agreement, which states that Sobel "shall retain ultimate supervision and control of the operation of the Stations." WTB Ex. 39, p. 5. That paragraph also gives Sobel a five day window to reject end user contracts if the rejection is "reasonable and based on the mutual interests of the parties" and a limited right to relocate a transmitter site if he can show that the relocation "is in the best interest of both Parties." Id. Nothing in those provisions demonstrates that Sobel exercises control of the Management Agreement stations. The general language in the agreement giving Sobel supervisory authority is contrary to the actual conduct of the parties. The general language is also inconsistent with the other provisions in the agreement which give Kay the exclusive right to sell service to customers, manage the stations, determine who repairs and maintains the stations, and negotiate contracts. These other provisions show that Sobel does not have the unfettered right to set prices or relocate sites. Instead, Sobel has only a limited right to reject contracts or relocate sites, if he is able to show that such action would be consistent with Kay's interests. Indeed, Kay has the sole right to negotiate contracts with customers. WTB Ex. 39, p. 1. Out of the hundreds of customers on the Management Agreement stations, Sobel can only recall two or three instances when he was involved in modifying rates. Tr. 123. Contrary to

Sobel's self-serving testimony that the agreement does not give Kay exclusive rights vis-a-vis Sobel (Tr. 265-266), the plain language of the agreement indicates otherwise.

20. Sobel's reliance on La Star Cellular Telephone Company, 9 FCC Rcd 7108, 7111 (1994), is misplaced. Sobel suggests that under La Star a binding agreement which effectuates an unauthorized transfer of control may be ignored when the actual conduct of the parties indicates otherwise. Sobel Conclusions, p. 20 ¶45 and n.9. La Star, however, says nothing of the kind. Under La Star, the Commission will not be bound by an agreement that complies with Section 310(d) when the actual conduct of the parties effectuates an unauthorized transfer of control. Sobel's argument, in any event, is of no matter since Section 310(d) requires that a licensee maintain both de jure and de facto control over its stations and licenses. See Lorain Journal Co. v. FCC, 351 F.2d 824, 828 (D.C. Cir.1965), cert. denied, 383 U.S. 967 (1966). In this regard, as the Bureau has shown, both the Management Agreement *and* the conduct of the parties run afoul of Section 310(d).

21. Finally, Sobel argues that Kay's option to purchase the Management Agreement stations at any time for \$500 each is not evidence of a transfer of control. Sobel Conclusions, pp. 20-21 ¶¶46-48. The Bureau agrees that the mere existence of an option is not, standing alone, conclusive evidence of a transfer of control. However, the existence of this option cannot be considered in a vacuum. Given (a) the nominal option price in relation to the value of the stations, (b) Kay's right to exercise the option at any time, and (c) Kay's control over the acquisition and disposition of licenses, the option is a compelling factor among many that

establish Kay's dominion over the Management Agreement stations, in violation of Section 310(d). See Bureau Conclusions, pp. 45-46 ¶81.<sup>6</sup>

22. Indeed, when all of the Intermountain factors are considered and the evidence is considered as a whole, the conclusion is inescapable that Kay has, without authority, taken over control of the Management Agreement stations from the licensee-of-record. The only apparent difference between the Management Agreement stations and stations licensed to Kay is the name on the license. Sobel is involved with both sets of stations, but his role is as a mere contract technician and consultant to Kay, not as the person in ultimate control of the stations. Both the Management Agreement and the manner in which these stations have operated in fact compel the conclusion that Kay, not Sobel controls these stations.

#### **IV. CONCLUSION**

23. The Bureau urges the Presiding Judge (a) to resolve the unauthorized transfer of control and misrepresentation/lack of candor issues adversely to Sobel and (b) to revoke all of Sobel's licenses, deny his pending applications, and dismiss his pending finder's preference

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<sup>6</sup> Sobel also is incorrect when he says the Bureau did not provide any evidence of the market value of the stations. Sobel Conclusions, pp. 20-21 ¶46. The offer to Kay to purchase the Management Agreement stations for \$1.5 million is the best possible evidence of their value.

requests, for the reasons stated herein and in the Bureau's proposed findings of fact and conclusions of law.

Respectfully submitted,  
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October 21, 1997

ATTACHMENT

Before the  
Federal Communications Commission  
Washington, D. C. 20554

In the Matter of	)	
	)	
Applications of Motorola, Inc.,	)	File Nos. 507505, 507475, 507473,
for 800 MHz Specialized Mobile Radio	)	507333, 507330, 507509, 508813,
Trunked Systems In California,	)	508124, 508046, 507477, 507511
New York, New Jersey, Maryland and	)	
Virginia	)	
Application of Motorola, Inc., for	)	File No. 558891
Assignment of Authorization of	)	
Specialized Mobile Radio Station	)	
WRG-816 at Mount Tamalpais,	)	
California	)	

ORDER

Issued: July 30, 1985

1. The Private Radio Bureau has before it for consideration Petitions to Dismiss Applications of Motorola Inc., filed by Atcomm, Inc. and Big Rock Communications, Inc. The petitions were filed on October 1, 1984, and are addressed to applications filed by Motorola for new 800 MHz Trunked Specialized Mobile Radio (SMR) systems located in California at Mt. Diablo, McKittrick, Montrose, Corona, Escondido, San Diego and Grass Valley. The Petitions to Dismiss are based on allegations that Motorola, through the use of management contracts, has assumed de facto control of SMR systems licensed to Comven, Inc., Port Services Company, and Mt. Tamalpais Communications, in violation of Section 310(d) of the Communications Act of 1934, as amended. This section of the Act requires Commission approval prior to any transfers of control of a facility licensed by the Commission. 1/ It is alleged by petitioners that this unauthorized assumption of control resulted in a violation of Rule 90.627(b) which precludes, with limited exceptions, the authorization to a licensee of more than one SMR system within 40 miles until all of the channels already assigned to that licensee are at least 80% loaded. Motorola has systems in the areas in question and these systems are not all 80% loaded. The Petitioners contend that these unauthorized transfers of control of SMR systems to Motorola raise character issues concerning Motorola's qualifications to be a Commission licensee. Also before us is a Petition for Reconsideration of the denial of a Petition to Dismiss Motorola's applications for new trunked SMR systems in Hamilton and West Orange, New Jersey; Huntington, New York; Towson, Maryland and Bull Run, Virginia, based on the alleged character issues arising out of Motorola's management

1/ Petitioners initially alleged that Motorola also had a management contract with Paging Network of San Francisco, Inc. Paging Network filed Comments stating that it never had a management contract with Motorola. Petitioners subsequently conceded this fact in their January 30, 1985, "Reply to Opposition to Joint Petition to Dismiss Applications."

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contracts in California. 2/ The Petition for Reconsideration was filed on January 18, 1985.

2. On December 27, 1984, petitioners also filed a Petition to Dismiss the application for assignment of authorization of Motorola for SMR system WRG-816, licensed to Mt. Tamalpais Communications, located at Mt. Tamalpais, California. 3/ Petitioners allege that Motorola contracted to receive 100 percent of the system revenues while the license remained in the name of Mt. Tamalpais Communications. The petitioners assert that the purpose of Motorola's unauthorized assumption of control and its delayed filing for assignment of authorization was to protect its application for a new system at Mt. Diablo. They also argue that Motorola delayed filing the assignment application, although it had already acquired the Mt. Tamalpais system, so that Mt. Tamalpais' application would not be removed from the top of the waiting list for additional frequencies. 4/

#### Background

3. Petitioners claim Motorola's management contract constitutes a de facto transfer of system control. They further allege that under these contracts Motorola purchases the central controller from the licensee, provides the marketing, customer billing and and system maintenance and pays the site rental in return for 70 to 80 percent of the gross receipts of a system. In support of these assertions, petitioners have submitted affidavits from Peter C. Padelford, General Partner of Big Rock Communications, and Johnny L. Champ, President of Motek Engineering Inc., stating that Motorola personnel offered them management contracts consistent with the above terms. Petitioners have also submitted a copy of an internal Motorola publication referring to Motorola-managed SMR systems as "our" systems, and a user agreement between Motorola and an end-user of a Motorola-managed SMR system which identifies Motorola as the owner-licensee.

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2/ The Bureau denied the Petition to Dismiss on December 19, 1984, because the allegations of violations in California did not provide a basis for delaying the grants of Motorola's applications in New York, New Jersey, Maryland and Virginia.

3/ For a complete list of the significant filings in this case, see the attached Appendix. The twenty-eighth filing was submitted on July 1, 1985.

4/ Applications for trunked channels at 816-821/861-866 MHz are processed on a first come, first served basis. If applications cannot be processed because of lack of spectrum, they are placed on a waiting list and grants are made as channels become available. A licensee is removed from the waiting list when channels are granted to it; this includes channels received through assignment or transfer.



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4. Motorola makes the following arguments in its Opposition to the Petitions to Dismiss its California, New York, New Jersey, Maryland and Virginia applications. First, it maintains that management contracts are common methods for SMR entrepreneurs to acquire the technical, marketing or financial expertise necessary to attract users. Second, it maintains these contracts provide efficient service to the end-users of private carrier (SMR) systems and optimize the return on the licensee's investment. Motorola also contends that the licensees which contract for its management services maintain the requisite degree of control over their facilities and fulfill their responsibilities as Commission licensees. This is reflected, Motorola contends, in the fact that these licensees continue to own the controller and transmitters and continue to exercise over-all supervision over the operation of their SMR systems. Motorola also submits the affidavit of Richard Wycoff, the author of the newsletter, who states that "our" referred to systems using Motorola equipment.

5. In its Opposition to the Petition to Dismiss its application for assignment of SMR station WRG-816, Motorola acknowledges that although it wanted to acquire WRG-816, it also wanted to retain its eligibility to prosecute its Mt. Diablo application. Motorola indicates it entered into negotiations to buy WRG-816 in late 1983 and signed an SMR Asset Purchase Agreement in February 1984 with a target date for the transfer of title of April 1, 1984. It anticipated that the system loading at that time would allow the maintenance of Motorola's Mt. Diablo application. Motorola concedes that it has "billed and operated" the system since April 1, 1984, and states in its submission to the Commission that it has had "de facto control of station WRG-816" since that date. Motorola also states that it did not file the assignment application for WRG-816 until April 4, 1984, and that the application was withdrawn on May 4, 1984, because Motorola believed the system was not loaded and that if the application were granted it would be precluded from pursuing its Mt. Diablo application.

6. Despite the withdrawal of the assignment application, Motorola states it orally agreed to continue to operate WRG-816 and received 100 percent of the system revenues in exchange for a monthly fee paid to Mt. Tamalpais Communications, pursuant to a Site Rental Agreement signed on March 6, 1984. Subsequently on November 27, 1984, Motorola resubmitted its application for assignment of WRG-816. Motorola states although this situation may show impropriety, it is atypical of the way it conducts its business and is a breach of its standard operating procedures. It maintains it resulted from a series of employee errors and personnel changes. Motorola also states that to prevent a recurrence of this type of activity it has implemented a continuous review of pending management agreements and revised its end-user agreements to reflect that it is the manager of an SMR system. Motorola requests that it be allowed to pursue its Mt. Diablo and other applications, if its assignment application is denied.